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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-96

Filed: 15 August 2017

Buncombe County, No. 14 CRS 087408

STATE OF NORTH CAROLINA

v.

MAXIMILIAN SAGE ALEXANDER

Appeal by defendant from judgment entered 3 June 2016 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 31 July 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

CALABRIA, Judge.

Maximilian Sage Alexander (“defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of involuntary manslaughter. After careful review, we find no prejudicial error.

I. Factual and Procedural Background

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On 13 July 2014, defendant, his wife, and their four-year-old daughter were driving in Asheville to a local restaurant for lunch. During the drive, another driver pulled out in front of defendant, and he became agitated. Defendant began to curse and raise his voice. Defendant's wife unsuccessfully attempted to calm him down, and the two began to argue. The argument escalated when they arrived in the parking lot of the restaurant. The family left, heading towards a residential area of Asheville. Defendant's wife again attempted to defuse the situation, but his anger intensified.

Defendant turned onto Kimberly Avenue and was behind a slower vehicle that prevented him from accelerating. He came to another stop, and the vehicle turned. At this point, defendant and his wife were still arguing, and he was in "in full-on rage mode." Because the slower car had turned, the roadway became clear for him to accelerate. Defendant was not paying attention to his surroundings or the speed at which he was driving, and his vehicle ultimately reached a speed of 65 miles per hour. The speed limit on Kimberly Avenue is 25 miles per hour.

Defendant went down a hill, then up a hill. As he crested the hill, he came upon a curve that he was unable to negotiate and lost control of the car. The car left the roadway, striking and killing 66-year-old Virginia Senechal, who was walking home from the grocery store. The car then continued onto an embankment and struck a tree. At the time defendant struck Ms. Senechal, he was driving at a speed of 40 to

45 miles per hour. Ms. Senechal was struck with such force that a body-shaped impression was left in the hood of defendant's car. Ms. Senechal died at the scene of the accident.

Defendant was not under the influence of alcohol or drugs at the time of the accident. However, he had a condition called spondylolisthesis, which caused back pain, and he had a valid prescription for Oxycodone. He had not taken any medication on the day of the accident, because he was concerned about addiction and did not like the way the medication made him feel. Defendant opined that he experienced irritability and intense rage as a result of not taking his pain medication. His wife noticed the same effect.

Defendant was charged by bills of indictment with reckless driving and involuntary manslaughter. A jury returned a verdict finding defendant guilty of both charges, and the trial court arrested judgment on the reckless driving conviction. The trial court sentenced defendant to a term of 13 months to 25 months' imprisonment in the custody of the North Carolina Department of Adult Correction. Defendant appeals.

II. Mistrial

In his first argument, defendant contends that the trial court erred by failing to declare a mistrial *ex mero motu* after a witness for the State provided improper

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legal conclusions during his testimony. The testimony in question was provided by

Officer Jonathan Derrick, an accident reconstruction expert:

Q. All right. And what is your opinion as to the cause of the accident?

A. My opinion as to the cause of the accident and why the accident happened is Mr. Alexander was *operating his vehicle in a reckless and careless manner, with[] wanton disregard for the rights and safety of others* as a result of --

MR. SCHECHET: Objection.

THE COURT: I'll sustain it as to the last.

MR. SCHECHET: Move to strike.

THE COURT: All right. Ladies and Gentlemen, you will disregard that answer. You won't consider it for any purpose in this trial. You can ask the question again.

Q. Yeah, if you can tell us what your opinion is as to the cause of this collision?

A. My opinion was that the cause of this collision was Mr. Alexander operating his vehicle at -- I'm sorry, 40 over the posted speed limit in a two-lane residential roadway with a sharp curve and operating his vehicle at that speed *constitutes careless and reckless driving and clearly constitutes careless and reckless driving because* --

MR. SCHECHET: Objection, your Honor.

THE COURT: Sustained.

MR. SCHECHET: Move to strike.

THE COURT: You will disregard the last portion as regards to careless and reckless driving constitutes

careless and reckless driving. You will not consider it for any purpose in this trial. Ask your next question.

Defendant submits that Officer Derrick's testimony, which is emphasized above, constitutes an improper legal conclusion that defendant caused Ms. Senechal's death by driving recklessly. The trial court agreed. The court therefore sustained both objections lodged by trial counsel, granted counsel's motion to strike each improper statement, and instructed the jury to disregard each statement. Defendant nonetheless argues that the statements were so inflammatory that the trial court should have granted a mistrial *ex mero motu*. For the reasons that follow, we disagree.

Here, it is undisputed that defendant did not request a mistrial. Nonetheless, the trial court is authorized to declare a mistrial upon its own motion. N.C. Gen. Stat. § 15A-1063 (2015). This statute provides, in pertinent part, that a judge may grant a mistrial if "[i]t is impossible for the trial to proceed in conformity with law[.]" *Id.* "This statute allows a judge. . . to grant a mistrial where he could reasonably conclude that the trial will not be fair and impartial." *State v. Lyons*, 77 N.C. App. 565, 566, 335 S.E.2d 532, 533 (1985). "An order of a mistrial on a motion of the court is addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed on appeal absent a gross abuse of that discretion." *Id.* at 566, 335 S.E.2d at 533-34 (internal citation and quotation marks omitted).

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As the State points out, defendant has not offered any evidence to contradict the presumption that the jurors here followed the trial court's curative instructions. *See State v. Phillips*, 171 N.C. App. 622, 629, 615 S.E.2d 382, 386, *disc. review denied*, 360 N.C. 74, 622 S.E.2d 628 (2005). More importantly, the overwhelming evidence shows that defendant's reckless driving was the proximate cause of the accident.

Defendant himself provided much of the testimony regarding the nature of his driving, and his wife's testimony corroborated his account. Defendant was driving at a speed of up to 65 miles per hour in a residential area with a posted speed limit of 25 miles per hour. His wife and four-year-old daughter were also in the car. Additionally, the road was hilly and curvy, and defendant admitted that he was not paying attention to his driving, his surroundings, or his speed. He admitted to losing control of the car around a curve. He also admitted to extreme road rage, intense anger, and fighting with his wife.

These facts provided the jury with ample evidence to conclude defendant engaged in reckless driving which proximately caused the death of Ms. Senechal. The court properly sustained defendant's objections and cured any possibility of prejudice by instructing the jury not to consider Officer Derrick's testimony. Therefore, we find that Officer Derrick's testimony did not create a situation where the trial could not

proceed in conformity with law. We hold that defendant has failed to show that the trial court abused its discretion by failing to declare a mistrial *ex mero motu*.¹

III. Irrelevant Evidence

In his second argument, defendant contends that the trial court erred by admitting, over defendant's objection, the testimony of Thomas Tribble, a friend of Ms. Senechal's. Mr. Tribble knew Ms. Senechal through her involvement in the Audubon Society and the local bird sanctuary. He testified that Ms. Senechal walked everywhere. Defendant argues that Mr. Tribble's testimony was irrelevant and therefore inadmissible. *See* N.C. Gen. Stat. § 8C-1, Rules 401-403 (2015).

"The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. A ruling under Rule 401, while not subject to an abuse of discretion standard, is "given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (internal citation and quotation marks omitted).

¹ Defendant also argues that he was deprived of effective assistance of counsel. However, he raises this only as an alternative argument, in the event this Court concluded that his failure to move for a mistrial constituted a failure to preserve the issue for appellate review. Because the issue was preserved for appeal, we need not address defendant's alternative argument.

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Additionally, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403. “In general, the exclusion of evidence under the Rule 403 balancing test is within the sound discretion of the trial court.” *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Defendant argues that Mr. Tribble’s testimony was inadmissible under Rule 401 because it was not relevant to any of the elements of the charged offenses. He also argues that it was inadmissible under Rule 403 because any probative value was substantially outweighed by the danger of unfair prejudice.

Even assuming *arguendo* that the evidence should have been excluded, any error was harmless. “The party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission. Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.” *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) (internal citations and quotation marks omitted).

Here, defendant has failed to demonstrate that he suffered any prejudice as a result of the admission of Mr. Tribble’s testimony. The facts recited in the previous section of this opinion support the conclusion that defendant is unable to demonstrate

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prejudice. The overwhelming evidence—including defendant’s own testimony—supported the jury’s verdict, and defendant is unable to prove that a different result would have been reached at trial. Accordingly, we find no prejudicial error at defendant’s trial.

NO PREJUDICIAL ERROR.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).